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CITATIONS

369-393—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 84

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON C. JORN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court dismissing the information on the ground of double jeopardy (A 60) is not reported. Excerpts from the proceedings at the aborted trial are reproduced in the Appendix at pp. 33–46.

JURISDICTION

The order of the district court dismissing the information was entered January 9, 1969. Notice of appeal to this Court was filed in the district court on February 7, 1969 (A 61–62). The jurisdictional statement was filed April 9, 1969, and this Court noted probable jurisdiction October 13, 1969 (A 63). The jurisdiction of this Court to review, on direct appeal,

a judgment dismissing an information on the ground of double jeopardy is conferred by 18 U.S.C. 3731. *United States* v. *Tateo,* 377 U.S. 463, 465; cf. *United States* v. *Blue,* 384 U.S. 251, 253–254.

QUESTION PRESENTED

Whether the constitutional prohibition of double jeopardy bars retrial of a defendant whose first trial was ended when the trial judge dismissed the jury which had been sworn, upon concluding that prosecution witnesses had not been adequately warned of their constitutional right not to incriminate themselves.

STATEMENT

Appellee was charged in February, 1968, on a twenty-five count information alleging that he had willfully assisted numerous individual taxpayers to prepare fraudulent income tax returns in which the claimed deductions were overstated, in violation of 26 U.S.C. 7206(2) (A 1–21). He was brought to trial in the United States District Court for the District of Utah on August 27, 1968, and twelve jurors were chosen and sworn (A 34). Then, out of the presence of the jury, the government moved to dismiss fourteen of the counts charged, and to substitute an amended, eleven count information. *Ibid.* In response, the trial judge suggested that the information as filed appeared to be "a whole bundle of two-bit stuff" which the government might wish to dismiss in its entirety if it had more time to consider the matter (*ibid.*), that the government might need more time for investigation, so that trial should not proceed (A 35), and that the defendant might wish time to

respond to the amended information (A 37). None of these suggestions was taken up, the amended information was filed, and appellee pleaded not guilty to each of its eleven counts. *Ibid.* The jury then returned. The government's first witness, an Internal Revenue Service official, was called to identify the income tax returns at issue and they were received in evidence (A 38–40).

The principal witnesses for the government were to have been some of the taxpayers whom appellee was said to have assisted. When the first was sworn, defense counsel objected that "each of these taxpayers should be warned as to his Constitutional rights before testifying * * *" (*ibid.*). The trial judge advised the witness that he was not required to respond until he had consulted his attorney, whose advice could be very important; that he need say nothing, because it was the government's burden to produce evidence of guilt "and the Fifth Amendment means that the Government cannot get the evidence to convict you from your own mouth"; that a lawyer would be appointed for him if he could not afford one, and that the government was "not entitled to interrogate you about anything if you don't want them to" (A 40–41). The court then continued:

> * * * Well, what do you want to do?
>
> The WITNESS. Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it further in this court.
>
> The COURT. Have you talked to a lawyer?

The WITNESS. No, sir.

The COURT. I am not going to let you admit it any further in this court. That is all there is about that. The admissions you have already made were very likely obtained from you without telling you what your Constitutional rights are.

The WITNESS. No, sir.

The COURT. What is that?

The WITNESS. We were advised at the time we were first contacted by the Internal Revenue Service.

The COURT. If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. * * * [A 41–42.]

The court instructed the witness to step down and asked whether all the government's witnesses were similarly situated. The Assistant United States Attorney responded that only Jorn, not the taxpayers, had been suspects in the criminal investigation but that, in accordance with local practice, the *Miranda* warnings had been given. The court expressed strong doubt whether any warnings that had been given were proper, and stated that he thought testimony should not be taken from "people who stand in very good shape to get prosecuted" themselves (A 42–43). The prosecutor replied to this that "the testimony will show that [the taxpayer-witnesses] were not aware what was in these—these falsities." The court found

this answer inadequate, and, interrupting the prosecutor's defense of the government's actions, permanently excused the jury. He then called all the taxpayer witnesses before him and warned them all as he had the first, again stressing particularly the need to see an attorney before deciding whether to testify; he said he would not let them testify until they had done so and he had talked to them again (A 43–46).

Although in this colloquy the judge spoke as if he contemplated that the case would be calendared again (A 46), a few months later he granted a defense motion for dismissal of the prosecution on the ground of double jeopardy (A 60).

SUMMARY OF ARGUMENT

The question in this case—one which has been before this Court several times in recent years—is under what circumstances a defendant whose trial has been interrupted by mistrial may be retried consistent with the Fifth Amendment's guarantee against double jeopardy. Relying principally on this Court's three most recent opinions touching that problem, *Gori* v. *United States,* 367 U.S. 364, *Downum* v. *United States,* 372 U.S. 734 and *United States* v. *Tateo,* 377 U.S. 463, we show that this Court has adhered to a rule of discretion, in which retrial is not barred if "there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter,* 336 U.S. 684, 688–689. That is, the question of retrial is to

be answered in the circumstances of each case upon examination of whether the prosecution has been unfairly aided or the defense has been harassed by the particular mistrial ordered.

Since here the proceedings leading to the discharge of the jury were begun when defense counsel asked that the taxpayers be warned, this case is close to if not actually in the category of cases where the defendant himself has sought mistrial. While counsel never made plain what kind of warning he thought should be given, his request invited the judge to do whatever the judge considered to be necessary and thus acquiesced in the discharge. A mistrial upon the defendant's request, of course, would not bar retrial except in the most unusual circumstances of provocation by the prosecution or the court—circumstances utterly lacking here.

Moreover, even if the defendant cannot be said to have sought this mistrial, the mistrial was granted for his advantage, not the prosecution's. The warnings given could only have inhibited adverse witnesses from testifying; the government was at all times ready to proceed. If the government was required to warn its witnesses of their Fifth Amendment rights before trial, the record shows that it did so; if a warning was required at trial, the government cannot be blamed for not having given it previously and the judge's strong words sufficed without any need for

discharge of the jury. Indeed, since appellee could not have asserted the witnesses' Fifth Amendment rights as a reason for reversal on appeal had the court refused to give the requested warning, it cannot be said that the government was aided by the mistrial.

These facts readily distinguish this case from *Downum, supra,* the only case in which this Court has held retrial to be barred after mistrial; in *Downum* the government sought the mistrial because its witness was missing, which would have prevented it from proving its case. The circumstances here, rather, are like those in *Gori* and *Tateo.* Although the court was mistaken in ordering the mistrial, it nonetheless acted in the interest of what it conceived to be substantial justice.

It would not further the cause of justice to hold that all errors in granting mistrial, even those which do not favor the government, entitle a defendant to escape without trial. Such a ruling would discourage conscientious judges from granting mistrial in circumstances admitting even the slightest doubt, and might appear to grant to others an arbitrary license to acquit. A mistrial granted in the interests of justice, not to favor the prosecution or harass the defense, does not render a retrial unfair so as to offend the prohibition against double jeopardy.

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ARGUMENT

I. UNDER THIS COURT'S CASES, A MISTRIAL FORECLOSES FURTHER PROSECUTION ONLY IF IN ALL THE CIRCUMSTANCES IT UNFAIRLY AIDS THE PROSECUTION OR HARASSES THE DEFENSE

This case presents the question under what circumstances a defendant whose trial has been interrupted by mistrial may be retried consistent with the Fifth Amendment's guarantee against double jeopardy. This question was twice before this Court in recent years. *Gori* v. *United States,* 367 U.S. 364; *Downum* v. *United States,* 372 U.S. 734.

The historical antecedents bearing on this issue were fully set out in the government's briefs in *Gori* and *Downum,* No. 486, October Term, 1960, and No. 489, October Term, 1962, and we think it would serve no useful purpose to repeat them at length here. It is enough to remember that the question of retrial after a mistrial arose in different historical circumstances than the issue of retrial after acquittal or conviction, and, initially, the double jeopardy clause was thought to apply only to the latter. Mistrial was treated as a matter of discretion. See *United States* v. *Perez,* 9 Wheat. 579, 580:

> the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. * * * To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes

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Wade v. *Hunter*, 336 U.S. at 688–689, the

Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment:

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Read together, we believe that the Court's most recent decisions, *Gori, Downum* and *United States* v. *Tateo*, 377 U.S. 463, confirm this analysis, and show that retrial was improperly denied here.

In *Gori*, the district court of its own motion had withdrawn a juror when, rightly or wrongly, it became convinced that the Assistant United States Attorney's examination of a government witness was leading to the introduction of incompetent evidence creating suspicion whether the defendant had committed other offenses than the one with which he was charged. Record, No. 486, October Term, 1960, p. 14. The prosecutor had not sought the mistrial, nor was there any indication that he had intentionally provoked one to abort a trial which he might have feared was going badly for him. Rather, this Court found it "unquestionable * * * that the order was the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—in favor of the accused." 367

U.S. at 367. Reviewing the prior cases, the Court found it settled that (367 U.S. at 368)

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

Putting aside for the future cases in which prosecutors instigated or judges granted mistrials for the purpose of harrassment or to avoid probable acquittal, the Court endorsed the rule of discretion it first stated in *Perez*. The Court was "unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial," fearing thus to "make [trial judges] unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." 367 U.S. at 369–370. It thus found reprosecution not barred.

Two Terms later, in *Downum*, this Court confronted the facts missing in *Gori*. There, the prosecutor had been the moving force in seeking mistrial,[1] and he did so because if forced to continue the trial he would have been unable to present sufficient evidence to

[1] This circumstance would not be a barrier to retrial in all cases—for example where the prosecution has uncovered evidence of a biased or tampered jury. See, *e.g. Simmons* v. *United States*, *supra*.

convict Downum of certain of the offenses charged against him; a crucial witness was missing. Mistrial was granted to help the government prove its case. The four dissenters from *Gori,* joined by Mr. Justice Goldberg, held in these circumstances that the double jeopardy clause prevented reprosecution. Their opinion again reviewed the prior cases, concluding "that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent." 372 U.S. at 735–736. It stressed, however, the limitation on the trial court's discretion to discharge a jury before verdict, which it characterized as one "to be exercised 'only in very extraordinary and striking circumstances.'" *Ibid. On the record before it,* 372 U.S. at 737, the Court accepted the reasoning of an earlier Ninth Circuit decision, *Cornero* v. *United States,* 48 F. 2d 69, that

> The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.

Tateo, decided the next Term, was not a case involving mistrial. There, upon improper urging by the trial judge, a defendant had interrupted his trial to plead guilty, and the issue was whether, having obtained vacation of the sentence then imposed because of the improprieties involved, he could be retried. Six members of the Court held that he could be retried, upon an analogy to the situation which would have existed had a mistrial been ordered as a result

of the impropriety. In so doing the opinion carefully noted that *Downum* was a case where mistrial had been procured by the prosecution because it was not ready to go forward with its case, and reiterated the holding of *Gori* that a second trial was proper "after the original trial judge declared a mistrial on the ground of possible prejudice to the defendant, although the judge acted without defendant's consent and the wisdom of granting a mistrial was doubtful." 377 U.S. at 467. In a cautionary footnote, the Court remarked that (377 U.S. at 468, n. 3)

> If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain.

The three dissenters, each of whom had joined the *Downum* majority, characterized the Court's opinion as a departure from *Downum,* and a return to the majority holding of *Gori.* 377 U.S. at 463 (Goldberg, J., dissenting).

As some members of the Court have noted in the several opinions, the three decisions reveal differing points of view. One case emphasizes discretion, consistently recognized by this Court since *Perez;* the next emphasizes the curbs on that discretion; and the third, the factual limitations of each of the cases involved. But, on their facts, the cases are mutually consistent. In *Downum,* the only case in which this Court has ever failed to uphold a retrial after discharge, mistrial was sought by the government and for its own advantage, as it would have been unable

to prove its case had trial proceeded. The mistrial in *Gori* and the guilty plea in *Tateo* were brought about by the judge, interceding in what he apparently thought were the defendant's best interests. This alignment is entirely consistent with the position the government has taken in all of these cases, that the question of retrial is to be answered in the circumstances of each case upon examination whether the prosecution has been unfairly aided or the defense has been harassed by the particular mistrial ordered.[2]

Nor is the issue one readily solved by the maxim that the government rather than the citizen should bear any risk of judicial arbitrariness or error in granting mistrials. To paraphrase this Court's remarks in *Tateo*, 377 U.S. at 466, it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any error in granting a mistrial. Judges have no arbitrary

[2] In *Downum*, the government had argued that the dismissal differed from a simple continuance only in a technical sense, in that no witnesses had been called and the case was recalendared for trial two days later. There were arguably extenuating circumstances regarding the government's failure to have all its witnesses present, since an unusually large number of cases had been calendared for trial that week and it was unclear when any particular case would be called. The government conceded, however, that among the circumstances to be considered were "the interest of the accused that he not be put to the expense, the mental strain and the harassment of protracted litigation * * * [and] his right to be protected against dismissal in order to help the prosecution, 'at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict.'" Govt. Br., No. 489, October Term 1962, p. 30. The government argued, unavailingly in the event, that its failure to have witnesses present was not the equivalent of a failure of evidence. Compare *id.*, 33, with 372 U.S. at 737.

license to acquit. But from the standpoint of the defendant it is at least as doubtful that trial courts would be as zealous as they now are in protecting against the effects of improprieties at trial if they knew that an error in granting mistrial would put the accused irrevocably beyond the reach of further prosecution. As a result, defendants would be remitted more often to appeal, and face even more protracted proceedings in the event they succeeded, than if a mistrial had been granted in midcourse.

II. THE MISTRIAL IN THIS CASE DID NOT AID THE PROSECUTION OR HARASS THE DEFENSE, SINCE, IF IT WAS NOT ATTRIBUTABLE TO A DEFENSE REQUEST, IT WAS GRANTED SOLELY TO AID THE DEFENSE AND AGAINST THE GOVERNMENT'S INTEREST

The facts of this case bring it near, if not into, the category of cases where the defendant himself has sought mistrial. The proceedings leading to discharge of the jury were begun when defense counsel suggested that

> each of these taxpayers should be warned as to his Constitutional rights before testifying, because I feel there is a possibility of a violation of the law. [A 40].

Counsel never addressed himself to what the warning he asked for should be, or whether it required the involvement of other attorneys which in turn might necessitate a continuance or dismissal of the trial for another day. Quite possibly he thought there would be no more than a few words of admonition from the judge, and was interested only in the effect that that might

have in quieting persons he expected to be adverse witnesses against his client. Nonetheless, in asking for the warning he plainly meant the judge to do whatever the judge concluded was necessary in the circumstances—including, if that were necessary, postponement of the trial to another day, whether by mistrial or otherwise. The outcome, in other words, was plainly consistent with counsel's request; the judge was doing what he felt was required to warn the witnesses. This Court has consistently indicated that, unless provoked by the prosecution or court out of fear of acquittal, a mistrial granted on a defendant's request will never foreclose retrial. *E.g., United States* v. *Tateo, supra,* 377 U.S. at 467–468.

Even if the Court does not conclude that defendant can be said to have sought this mistrial, it is plain that the mistrial was granted for his advantage, not the prosecution's. The prosecution was present in court and ready to proceed. While insisting that it had previously warned the witnesses, as the witness who testified confirmed, it did not object to the extensive warning the court gave and argued to the end that it should be permitted to continue presenting its case. The warning was in effect a blunt suggestion not to testify; and the dismissal so that the witnesses could consult further with attorneys, to be followed by still further discussions with the court before it would permit them to testify (A 46), served only to drive more deeply home the plain message that it would be in the witness' best interests not to testify. The prosecution had nothing to gain from these procedures. They were of possible advantage only to the

appellee. Even if their wisdom was highly doubtful, that does not take this case out of the ambit of *Gori*, for there, too, the measures taken out of solicitude for the defense were quite possibly too extreme. 367 U.S. at 367; *United States* v. *Tateo, supra,* 372 U.S. at 467.

Appellee may argue that in fact the prosecution was aided, because its witnesses had not been properly prepared to testify in the matter. But this argument assumes that, had the court not taken the steps it did, appellee would have been entitled to have the witnesses excluded from testifying or, if that were not done, to reversal on appeal. It is, of course, entirely proper for judges to assure, for the protection of *witnesses,* that witnesses are aware of the possibly incriminatory effects of what they may say. *United States* v. *Maloney,* 262 F. 2d 535, 537 (C.A. 2); *Long* v. *United States,* 360 F. 2d 829, 833–834 (C.A.D.C.); 8 Wigmore, Evidence, § 2270. No case, however, indicates that this procedure is required for the protection of the accused, and that failure to follow it constitutes error entitling *him* to a new trial.

Whether there are consequences inhibiting future use of such testimony in criminal trials in which the witnesses themselves are defendants if proper warnings are not given, is a question this Court need not now decide. For it does not follow from the existence of such consequences that the accused is entitled to claim the benefit of this flaw. Cf. *New York* v. *Portelli and Rosenberg,* 15 N.Y. 2d 235, certiorari denied, 382 U.S. 1009; *Alderman* v. *United States,* 394 U.S. 165, 171–176. As this Court has fre-

quently stated, Fifth Amendment rights are personal rights. See *Miranda* v. *Arizona*, 384 U.S. 436; *George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286; *Rogers* v. *United States*, 340 U.S. 367. It follows that defendant had no right to invoke the witness' privilege to prevent them from testifying at trial, whether or not they were properly prepared. *Long* v. *United States, supra;* 8 Wigmore, Evidence, § 2270.

In any event, the witnesses were properly prepared. Since they were neither suspects nor in custody *before* trial, no warnings were then required,[3] although in fact warnings were given (A 42). If the witnesses' presence at trial under subpoena were to be viewed as a custodial interrogation for *Miranda* purposes—itself an improper characterization[4]—it is then at trial that the *Miranda* warning would have to be given. Indeed, the judge did give a very forceful and fully adequate warning at that point. (A 40–41.) The

[3] See *Mathis* v. *United States*, 391 U.S. 1; *Orozco* v. *Texas*, 394 U.S. 324; *Spinney* v. *United States*, 385 F. 2d 908, 910 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz*, 401 F. 2d 219, 223 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso*, 378 F. 2d 612, 619, modified, 387 F. 2d 376 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, October 13, 1969, No. 163, this Term; *Cohen* v. *United States*, 405 F. 2d 34, 40 (C.A. 8), certiorari denied, 394 U.S. 943; *Spahr* v. *United States*, 409 F. 2d 1303 (C.A. 9), certiorari denied, October 13, 1969, No. 366, this Term; contra, *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7).

[4] Unlike private interrogation in chambers, a courtroom is a public place, where proceedings are fully transcribed and the presence of counsel and the presiding judge afford substantial assurance that Fifth Amendment rights will be respected. To these circumstances, the concerns which underlay *Miranda* are largely inapplicable.

prosecutor is not to be faulted for not having given this warning earlier, for under the hypothesis that the trial constitutes the custodial interrogation, the need to warn does not earlier mature. Finally, nothing in *Miranda* requires, as the trial judge appeared to conclude (A 41, 46), that the interrogated person *must* confer with a lawyer before "responding" to "interrogation." It sufficed that after having been warned and told he might (indeed, should) consult counsel, the witness here responded that he wished to testify nonetheless (A 41; 384 U.S. at 475, 478).

In sum, the mistrial was not due to any lack of proper preparation by the prosecution. The trial judge, like the trial judge in *Gori*, acted overhastily in the interests of the witnesses and the accused. Although the court was plainly mistaken in ordering a mistrial, it nevertheless acted in the interests of what it conceived to be substantial justice. Warnings had been given, and if the judge felt that additional warnings were required, a vigorous judicial presentation, such as he gave (A. 40–46), or an overnight recess, would surely have sufficed. But judges, being human, make human errors. It would hardly further the cause of justice to hold that mere error by a judge, *ipso facto*, entitles a defendant to escape without trial. In our system, the trial judge necessarily has considerable discretion in the conduct of a trial, and in the determination of whether a mistrial should be granted. If it should be held that mere error in his conclusion as to the necessity for a mistrial, where no oppressive motive or result is shown, nevertheless bars further trial, the results could well be detrimental to

justice. A conscientious and fair-minded trial judge would feel required to resolve any doubts in favor of the government since an error against the defendant would result in an acquittal in fact. On the other hand, a capricious judge could grant a defendant the benefits of a judgment of acquittal without purporting to do so and without having the possibility of this action questioned. In short, the mere fact that the trial judge here—as in *Gori*—was probably wrong when, in effect, he declared a mistrial in the interests of justice, does not render a retrial unfair so as to offend the prohibition against double jeopardy.

CONCLUSION

It is respectfully submitted that the order dismissing the indictment should be vacated and this cause remanded to the district court for trial.

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